

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of)	WT Docket No. 03-66
the Commission's Rules to Facilitate the)	RM-10586
Provision of Fixed and Mobile Broadband)	
Access, Educational and Other Advanced)	
Services in the 2150-2162 and 2500-2690)	
MHz Bands)	
)	WT Docket No. 03-67
Part 1 of the Commission's Rules - Further)	
Competitive Bidding Procedures)	
)	MM Docket No. 97-217
Amendment of Parts 21 and 74 to Enable)	
Multipoint Distribution Service and the)	
Instructional Television Fixed Service)	
Amendment of Parts 21 and 74 to Engage in)	
Fixed Two-Way Transmissions)	
)	WT Docket No. 02-68
Amendment of Parts 21 and 74)	RM-9718
of the Commission's Rules With Regard to)	
Licensing in the Multipoint)	
Distribution Service and in the)	
Instructional Television Fixed Service for the)	
Gulf of Mexico)	
)	WT Docket No. 00-230
Promoting Efficient Use of Spectrum Through)	
Elimination of Barriers to the Development of)	
Secondary Markets)	

PETITION FOR RECONSIDERATION

North American Catholic Educational Programming Foundation, Inc. ("NACEPF"), by counsel, hereby submits its Petition for Reconsideration in the above-captioned matter.¹

¹ *Report and Order and Further Notice of Proposed Rulemaking ("Report & Order")*, FCC 04-135, released July 29, 2004, 69 FR 72020 (December 10, 2004).

Specifically, NACEPF seeks reconsideration of the Commission's decision to dismiss all mutually exclusive ITFS applications filed prior to the release date of the *Notice of Proposed Rulemaking*² in this proceeding. Even more specifically, NACEPF seeks reconsideration of the dismissal of its pending applications.³ The Commission's decision failed to serve the public interest and reconsideration should be granted.

The following is shown in support thereof:

1. The Commission's decision gives "due deference" to non-mutually exclusive applications filed prior to the *NPRM*'s release, but fails to provide any reasoned analysis for treating pre-*NPRM* mutually exclusive applications with any less deference.⁴ "[N]o matter what the Commission decides to do to any particular rule— retain, repeal, or modify (whether to make more or less stringent)—it must do so in the public interest **and** support its decision with a reasoned analysis."⁵ The Commission failed to do so in this instance and should therefore grant reconsideration by reinstating all pending mutually exclusive applications dismissed pursuant to the *Report and Order*.

2. The sole basis for the Commission's decision to dismiss these applications, some of which, such as NACEPF's application for a new station in Swainsboro, Georgia, have been pending since the mid-1990s,⁶ was that "with regard to pending applications in other services that have been converted to geographic area licensing, the Commission has dismissed the

² *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722, para. 263 (2003).

³ Following is a list of NACEPF's new facilities applications pending as of the *NPRM*'s release date: Call Sign/File No. BPIF-19910722DI, Toledo, Ohio; Call Sign/File No. 19951020NE, Delta, Colorado; Call Sign/File No. BMPLIF-961220AA, Swainsboro, Georgia; Call Sign/File No. 19951020JD, Sierra Vista, Arizona; 19951020AG, Eureka, California; BPLIF-951020LD.

⁴ *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-135, para. 261, released July 29, 2004.

⁵ *Prometheus Radio Project v. Federal Communications Commission*, Case No. 03-3388, ____ (3d Cir. 2004).

⁶ See File No. BMPLIF-961220AA.

pending mutually exclusive applications at bar.”⁷ The Commission nowhere expresses why a decision applicable to a non-educational service with completely different service rules and obligations should be applicable to applications for ITFS (EBS) facilities or otherwise supports its dismissal decision with a reasoned analysis.

3. Indeed, in the face of the assertion that “only entities whose applications are currently mutually exclusive and that have been accepted for filing by the Commission should be permitted to participate in an auction against each other for the channels that are subject to those applications,” the Commission merely stated its disagreement. Such action does not amount to reasoned decision making.

4. The ITFS service provides a “unique and significant value” and in taking actions with respect to the service and applications therefore “it is imperative to focus on the purpose of ITFS.”⁸ As discussed above, the Commission failed to do so in this case.

5. The unique nature of the service distinguishes it from other services and renders inapplicable any decision to dismiss pending mutually exclusive ITFS applications simply because the Commission took similar action in other services where it adopted geographic licensing.⁹ The Commission should grant a similar amount of deference to mutually exclusive

⁷ *Id.*, citing *Amendment of the Commission’s Rules Regarding Maritime Communications*, PR Docket No. 92-257, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 12 FCC Rcd 16949, 17015-16 (1997). The Commission did not dismiss mutually exclusive pending applications in that decision. Rather, it merely determined to hold such applications “in abeyance until the conclusion of this proceeding” and to “determine later, in accordance with such new rules as are adopted, whether to process or return any such pending applications.” *Id.* The Commission did take such action, however, in its *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19853 (1998).

⁸ *Amendment of Part 74 of the Commission’s Rules and Regulations regarding the Instructional Television Fixed Service*, 101 FCC 2d 50, para. 76 (1985). See also, *Sherburne Wright Educational Technology Cooperative Channels G1, G2, G3, and G4 Buffalo, Minnesota; For License in the Instructional Television Fixed Service*, 4 FCC Rcd 4076, para. 9 (1989) (recognizing the “specific purpose and unique needs of ITFS”); *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, FCC 04-167, n. 137 (September 02, 2004) (“there are unique policies associated with ITFS licensees’ educational purposes”).

⁹ *Id.*

applications as it granted to non-mutually exclusive applicants, reinstate those applications and process them in accordance with its rules.

6. Like applications not subject to mutually exclusive applications, applicants in mutually exclusive proceedings filed their applications with the legitimate expectation that their applications would be processed in the ordinary course. NACEPF and other similarly situated applicants certainly had no expectation that their applications would be allowed to languish for the better part of eight years only to be summarily dismissed simply because the Commission adopted a geographic licensing scheme.

7. Accordingly, the Commission should reconsider its decision and reinstate all dismissed mutually exclusive applications. Further, only those applicants should be permitted to participate in an auction against each other for the channels that are subject to those applications. Additionally, the Commission should not require any minimum bid in any of these auctions and should not allow any third party commercial entities to directly fund the bids of any participant.

Conclusion

Wherefore, the premises considered, North American Catholic Educational Programming Foundation, Inc. respectfully requests that the Commission grant reconsideration as requested herein.

Respectfully submitted,

**NORTH AMERICAN CATHOLIC
EDUCATIONAL PROGRAMMING
FOUNDATION, INC.**

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